

**ORIGINAL  
RECEIVED**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

**AUG 3 0 1993**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of § 73.202(b) )  
Table of Allotments, ) RM -  
FM Broadcast Stations )  
(Milledgeville, Georgia) )

To: Chief, Policy and Rules Division  
Mass Media Bureau

**PETITION FOR RECONSIDERATION**

Radio Perry, Inc. ("Radio Perry"), by its attorneys, hereby submits its Petition for Reconsideration of the undated letter to Eric S. Kravetz, counsel to Radio Perry, from Michael C. Ruger, Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau (Reply Ref. 1800D5) received by counsel on August 20, 1993. The Bureau letter erroneously returned a Petition for Rule Making filed by Radio Perry on March 30, 1993, as "unacceptable for consideration". In support thereof, the following is stated:

In its Petition for Rule Making, Radio Perry requested that the Commission issue a Notice of Proposed Rule Making, to determine whether its rules should be amended to allot Channel 264A at Milledgeville, Georgia, in lieu of Channel 264C3. Radio Perry pointed out that such proceeding would enable the Commission to determine whether the public would be better served by the improved service of WPGA-FM, Perry, Georgia, which then would be able to increase its effective radiated power to 6.0

No. of Copies rec'd  
List A B C D E

**045****MMB**

kilowatts, or by Station WLRR(FM), Milledgeville, Georgia, whose licensee apparently misrepresented his intention to promptly upgrade that station and in any event had made no effort to provide improved service to the public.<sup>1</sup>

The Bureau letter recited that the Commission's Rules do not provide for the automatic downgrading of an allotment in these circumstances and that Radio Perry had failed to serve WLRR(FM) with a copy of its Petition for Rule Making. The letter also notes that WLRR(FM) had since filed an application to upgrade its facilities, after the Bureau responded to Radio Perry's Petition by advising WLRR(FM) of the need to do so. This action by WLRR(FM), the Bureau asserts, makes the Petition unacceptable for consideration.

The Bureau letter errs in several respects. First, Radio Perry's Petition did not state only that the rescision of the Channel 264A upgrade could be deemed automatic. Radio Perry also contended that, in the circumstances of this case, the matter at least must be evaluated in the context of the requested

---

<sup>1</sup> Radio Perry also contended that WLRR(FM)'s failure -- for over one and one-half years -- to satisfy the 90-day condition set forth in the Report and Order which granted WLRR(FM)'s request to upgrade its channel should result in the automatic re-specification of Channel 264A to Milledgeville. The 90-day condition need not be rigidly enforced, particularly where the delay is small or the result of involuntary factors, but to simply countenance a delay of such magnitude would disserve the public interest in this instance and establish an undesirable precedent as a general matter.

rulemaking proceeding, where WLRR(FM)'s failures and the countervailing benefits which would result from the improvement of Radio Perry's service could be evaluated. Second, Radio Perry served WLRR(FM)'s counsel of record, who in fact has addressed the Bureau on the matter and filed WLRR(FM)'s application for construction permit in response to the Bureau's letter to WLRR(FM). Moreover, a certificate of service was attached to Radio Perry's Petition for Rule Making. Radio Perry is unaware of any Commission ruling which provides that service upon a licensee's counsel of record does not constitute service upon the licensee. Finally, it is unfair, circular reasoning for the Bureau to: (a) respond to Radio Perry's Petition by advising WLRR(FM) to file an application; (b) accepting such application; and (c) ruling that such acceptance precludes consideration of the matters raised by the Petitioner.

In this regard, the various self-evident public interest considerations which further support Radio Perry's Petition have been explicated in Radio Perry's Petition to Dismiss the application submitted by WLRR(FM). A copy of that Petition is attached hereto for the convenience of the Bureau.<sup>2</sup>

---

<sup>2</sup> A copy of the Petition for Rule Making, which was returned with the Bureau's letter, also is attached.

In view of the above, the Bureau should reconsider its letter dismissing Radio Perry's Petition for Rule Making and upon such reconsideration grant such Petition.

Respectfully submitted,

RADIO PERRY, INC.

By:



Eric S. Kravetz  
Brown, Nietert & Kaufman  
1920 N Street, N.W.  
Suite 660  
Washington, D.C. 20036  
(202) 887-0600

Its Counsel

August 30, 1993

F:\ESK\0827PFR.RPI

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Application of )

PRESTON W. SMALL )

For Construction Permit )  
for an FM Station on )  
Channel 264C3, in )  
Milledgeville, GA )

File No. BPH-930706IE

To: Chief, Mass Media Bureau

**PETITION TO DISMISS**

Radio Perry, Inc. ("Radio Perry"), by its attorneys, hereby submits its Petition to Dismiss the above-referenced application by Preston W. Small ("Small") to construct an FM station to operate on Channel 264C3 at Milledgeville, Georgia. In support thereof, the following is stated:

**A. Background**

Radio Perry is licensee of FM broadcast station WPGA-FM, Perry, Georgia, a Class A FM facility operating on Channel 265A. WPGA-FM presently is restricted to an Effective Radiated Power ("ERP") equivalent to 3 kilowatts transmitted from an antenna 100 meters above average terrain. Small is licensee of station WLRR(FM), Milledgeville, Georgia. By Report and Order in MM Docket No. 989-547, released June 28, 1991 (6 FCC Rcd. 3753), the Mass Media Bureau amended Section 73.202(b) of the Commission's

rules, upgrading the FM channel allotted to Milledgeville from Channel 264A to Channel 264C3. The Bureau did so pursuant to a petition by Small (who was then a permittee) requesting such upgrade and in light of Small's representation that, promptly upon grant of his request, he would file an application for a permit to construct WLRR(FM)'s facilities on Channel 264C3. In the Report and Order, the Bureau therefore specified, inter alia, the following condition:

(a) Within 90 days of the effective date of this Order, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

The effective date of the Order, as stated therein, was August 12, 1991, i.e., almost a full two years before the subject application was filed with the Commission.<sup>1</sup>

As noted above, Radio Perry's Station WPGA-FM is restricted to an ERP equivalent to 3 kw, a low power which subjects it to a severe competitive disadvantage even as against other Class A facilities, which generally operate with ERPs of 6 kw. This disadvantage, the Commission has found, not only adversely affects the financial viability of the station, but also has an adverse impact upon service to the public. See, Second Report and Order, 4 FCC Rcd. 6375 (1989). In this instance, the only reason why Radio Perry cannot improve WPGA-FM's facilities to operate with the full power authorized to most other Class A

---

<sup>1</sup> As noted infra, even this belated filing date was imposed upon Small.

stations is the allotment of Channel 264C3 to Milledgeville, which creates a short spacing under the Commission's rules. Such short spacing would not exist if Channel 264A were instead allotted to that community.

In view of these circumstances, Radio Perry submitted a Petition for Rule Making to the Bureau on March 30, 1993, requesting the amendment of Section 73.202(b) to allot channel 264A to Milledgeville; i.e., the channel which initially was allotted to the community, the channel for which Small initially had applied, and the channel on which Small as a practical matter has been operating his station. As explained in its Petition, Radio Perry sought such action because it wished to improve its own service, and the unused and effectively abandoned C3 channel at Milledgeville precluded such improvement.<sup>2</sup>

Rather than instituting the requested rulemaking, however, the Bureau by its FM Branch sent a letter to Small advising him that he would be made party to such rulemaking unless he submitted an FCC Form 301 application for a permit to construct a

---

<sup>2</sup> Radio Perry previously had sought to upgrade its channel to Class C3, but withdrew its Petition after Small retracted his own proposal to relocate WLRR(FM)'s transmitter site in connection with his Petition to upgrade, because such action by Small would have required Radio Perry to accept a site restriction which would have sacrificed most of the benefits of an upgrade. The withdrawal of its earlier Petition to upgrade is not relevant to Radio Perry's current desire to operate with 6.0 kw from its present site.

station to operate on Channel 264C3. That is, having received no application from Small during the 90-day period specified in its June, 1991 Report and Order, having received no such application during the ensuing 16½ months prior to the filing of Radio Perry's Petition, and having received no such application during the 65-day period between the filing of that Petition and the mailing of its June 4, 1993 letter, the Bureau simply chose to provide Small with yet another period within which to file his application. Small thereupon responded to this last ultimatum, submitting an application dated as of July 2, 1993, the final day of such period.<sup>3</sup>

---

<sup>3</sup> It should be noted that the technical portion of the application was executed by Small's consulting engineer, who is located in Florida, on July 1, 1993. Small, a resident of Georgia, purportedly then executed the original application on July 2, 1993, the same day that his attorney, located in Washington, D.C., transmitted the application to the Commission. Moreover, Small not only executed the application, he hand wrote both the "Name of Applicant" and his "Title" on the final, certification page of the Form 301. The date, however, was typed with typeface matching the remainder of the application.

It therefore is apparent that Small executed the Form 301 in blank, before the office of his attorney completed the non-technical portion of the form and without reviewing the engineering portion of that application. Absent a full, supported explanation of this matter by Small which would demonstrate otherwise, it necessarily must be concluded that Small only met this final deadline through means of an improper certification which itself raises an issue whether his application may be accepted.



## B. Argument

In view of the foregoing, the Mass Media Bureau should dismiss the subject application filed by Small and initiate the rulemaking proceeding which has been requested by Radio Perry. As explained below, the Bureau's June 4, 1993 letter to Small was ill-advised and should be rescinded.

As an initial matter, the Bureau, which issued its letter unsolicited by any party, did so without explanation and without providing Radio Perry with an opportunity to address the matter. Further, the obvious and foreseeable effect of the Bureau's action was to ultimately require the dismissal of Radio Perry's Petition for Rule Making by mooted the predicate for the action requested therein. Thus, Radio Perry has been effectively precluded from showing how the public would be better served by the adoption of its proposal, Small has been excused from explaining why (contrary to his earlier representation to the Commission) he failed to even apply for an upgraded facility for the two-year period following the issuance of the 1991 Report and Order, and the Commission has been deprived of the opportunity of reaching a public interest determination concerning those matters.<sup>4</sup> These factors, standing alone, reasonably require the

---

<sup>4</sup> Given a minimum time for processing the Small application and the 18-month construction period allowed by the Commission's rules, the Bureau also thereby provided Small with yet an additional two-year period within which he will be allowed to do nothing except preclude the improvement of WPGA-FM's facilities.

reversal of the Bureau's action and the consequent dismissal of Small's application.

Furthermore, the Bureau's action creates an undesirable precedent which would allow any station to ignore its commitments to the Commission and the public, "warehousing" spectrum to the preclusion of other users who wish to serve the public. After providing Small with a two-year period within which to submit an application (and ignoring the 90-day condition in its own Report and Order), the Bureau would be hard-pressed to impose a stricter standard upon other permittees and licensees in the future, particularly because it has requested no explanation of or justification for such delay on the part of Small.<sup>5</sup>

The Bureau's letter also runs directly contrary to the Commission's newer policies which refuse to indulge negligent parties before it. Thus, the Commission has imposed 18-month construction periods upon FM permittees, which may be extended upon appropriate request and explanation by such permittees. In the subject instance, however, the Bureau has allowed a 24-month

---

<sup>5</sup> Radio Perry does not argue that the 90-day deadline should be rigidly enforced. Flexibility is appropriate, particularly where the additional time involved is minimal or when a reasonable explanation for delay has been proffered. The circumstances in this case, however, cannot simply be overlooked.

delay by Small in a comparable context, without any explanation being requested from, or proffered by, that party.<sup>6</sup>

Finally, the procedure adopted by the Bureau has materially prejudiced Radio Perry, which now will be unable to upgrade its own facilities. Such prejudice has been imposed without providing Radio Perry with an opportunity to address the matter and, in fact, by precluding the rulemaking proceeding requested by Radio Perry wherein it could have addressed the matter. The action by the Bureau, which was triggered by Radio Perry's Petition and yet served to effectively deny it, thereby adversely affected Radio Perry's interests without explanation or apparent justification, in addition to disserving the public interest.

### C. Conclusion

In view of all of the foregoing, it is respectfully submitted that the June 4, 1993 letter from the FM Branch to Preston Small should be rescinded and the application filed by Small in response thereto should be dismissed. The Petition for Rule Making filed by Radio Perry on March 30, 1993, should instead be granted, so that the Commission may address and

---

<sup>6</sup> Notably, Small did promptly file an application after receiving the Bureau's June 4, 1993 ultimatum. Absent a full and supported showing to the contrary by Small, the only reasonable conclusion which can be drawn from this fact is that Small could have filed an application earlier had he wished to do so.

resolve all of the public interest factors raised by such  
Petition.

Respectfully submitted,

RADIO PERRY, INC.

By:   
Eric S. Kravetz

Brown, Nietert & Kaufman  
1920 N Street, N.W.  
Suite 660  
Washington, D.C. 20036  
(202) 887-0600

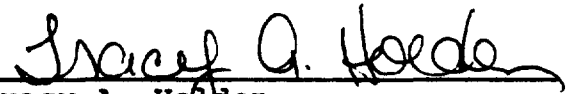
Its Attorneys

Dated: July 23, 1993

**CERTIFICATE OF SERVICE**

I, Tracy A. Holden, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on the 23rd day of July, 1993, I caused copies of the foregoing "PETITION TO DISMISS" to be send via U.S. Mail, postage pre-paid to the person named below:

Timothy E. Welch, Esq.  
Law Offices of Dean George  
Hill and Welch  
1330 New Hampshire Avenue, N.W.  
Suite 113  
Washington, D.C. 20036

  
Tracy A. Holden

**FCC COPY**

**RECEIVED**

**MAR 30 1993**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Amendment of § 73.202(b) )  
Table of Allotments, ) RM -  
FM Broadcast Stations )  
(Milledgeville, Georgia) )

To: Chief, Policy and Rules Division  
Mass Media Bureau

**PETITION FOR RULE MAKING**

Radio Perry, Inc. ("Radio Perry"), by its attorneys, hereby respectfully requests the Commission to issue a Notice of Proposed Rule Making looking toward the amendment of Section 73.202(b) of its Rules as follows:

<u>Community</u>	<u>Channel Allotment</u>	
	<u>Present</u>	<u>Proposed</u>
Milledgeville, GA	264C3	264A

In support of this request, the following is stated:

Radio Perry is licensee of FM broadcast station WPGA-FM, Perry, Georgia, which serves the community of Perry and the surrounding area on Channel 265A. Radio Perry's service is severely constrained, however, because it must operate its Class A facility with an Effective Radiated Power ("ERP") of only 3 kw. As the Commission recognized when it modified its rules to permit

Class A operations with an ERP of 6 kw, stations broadcasting with 3 kw are at a substantial disadvantage when competing with higher-powered stations, which affects their financial viability and their ability to serve the public. Second Report and Order, MM Docket No. 88-375, released August 18, 1989 (4 FCC Rcd 6375). Needless to say, operation of a 3 kw Class A facility has become even more difficult now that other Class A facilities have doubled their power. Radio Perry therefore wishes to increase its ERP to 6 kw, as generally authorized by the Commission's rules.

As demonstrated by the attached report by Bromo Communications, Inc., Petitioner's consulting engineers, such increase in WPGA-FM's authorized ERP will not conflict with any other existing or proposed FM channel allotment, if the channel currently allotted to Milledgeville, Georgia, is deemed to be Channel 264A rather than Channel 264C3 and Section 73.202(b) is amended to reflect that fact.

In this regard, it should be noted that Channel 264C3 was allotted to Milledgeville pursuant to the request of Preston W. Small, licensee of Station WLRR(FM), who represented that he would promptly modify his facilities and operate on Channel 264C3 if his petition to upgrade the Milledgeville channel were granted. The requested upgrade subsequently was granted by the Chief, Allocations Branch, in MM Docket No. 89-547, by Report and

Order released June 28, 1991 (6 FCC Rcd 3753), subject to, inter alia, the following condition:

(a) Within 90 days of the effective date of this Order, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

The effective date of the Order, as stated therein, was August 12, 1991, i.e., over one and one-half years ago. No application, however, has ever been filed.<sup>1</sup>

In view of the fact that the condition specified in the June 28, 1991 Report and Order never has been satisfied, the deletion of Channel 264C3 and the re-specification of Channel 264A as Milledgeville's allotted frequency should be automatic, thus clearing the way for an application to increase power on the part of Radio Perry. If, however, a rule making is required before the Milledgeville channel and the WLRR(FM) license are restored to their Class A status, such rule making should be commenced

---

<sup>1</sup> The Report and Order also allotted Channel 266A to Hannahs Mill, Georgia, but such action was reconsidered and the allotment deleted by Memorandum Opinion and Order, released June 18, 1992 (7 FCC Rcd 3944). The Report and Order also reflected the withdrawal of Radio Perry's request to upgrade its channel to 265C3. Radio Perry had filed its petition in light of an earlier petition by WLRR(FM) which proposed the relocation of the WLRR(FM) site. When WLRR(FM) withdrew that earlier proposal, Radio Perry also withdrew its request because the upgrade it had requested would then have required an undesirable site restriction.



promptly, so that Radio Perry, which is ready and willing to upgrade its service to the public, will have an opportunity to do so.

In view of the foregoing, it is respectfully submitted that the Commission should amend its Table of Allotments (Section 73.202(b)) as requested herein.

Respectfully submitted,

RADIO PERRY, INC.

By:   
Eric S. Kravetz

Brown, Nietert & Kaufman,  
Chartered  
1920 N Street, N.W., Suite 660  
Washington, D.C. 20036  
(202) 887-0600

Its Attorneys

March 30, 1993  
ESK:RadioGA.pet:BJ

TECHNICAL STATEMENT  
RADIO PERRY, INC.  
265A - 100.9 MHZ  
PERRY, GEORGIA  
March 1993

This Statement is being provided on behalf of Radio Perry, Inc., licensee of WPGA-FM Radio Station, Perry, Georgia. WPGA wishes to increase to a full 6.0 kW equivalent Class A station. The only impediment to this increase is the vacant C3 allocation at Milledgeville, Georgia, which is reserved for WLRR-FM through Docket #89-547. Attached as Exhibit #1 is the allocation study indicating the Milledgeville C3 shortage. WPGA clears all other allocation constraints.

We have tried to be as accurate as possible in the preparation of this report. Should there be any questions concerning the information contained herein, we welcome the opportunity to discuss the matter by phone (912) 638-5608.

RADIO PERRY, INC.  
SEARCHING AT PRESENT SITE

REFERENCE  
32 33 20 N  
83 44 14 W

CLASS A  
Current rules spacings  
CHANNEL 265 -100.9 MHz

DISPLAY DATES  
DATA 02-24-93  
SEARCH 03-25-19

CALL TYPE	CH# LAT	CITY LNG	STATE PWR	BEAR' HT	D-KM D-Mi	R-KM R-Mi	MARGIN (KM)
WPGAFM	265A	Perry	GA	0.0	0.00	114.5	-114.50 *
LI CN	32 33 20	83 44 14	2.250 kW	108M	0.0	71.2	
Radio Perry, Inc.					BLH840511DN		
ALOPEN	264C3	Milledgeville	GA	45.1	84.03	88.5	-4.47 *
AL N	33 05 24	83 06 04	0.000 kW	0M	52.2	55.0	
>Site restricted-Effective 08-12-91-Reserved for WLRR per D89-547							
AD266	266A	Thomaston	GA	302.3	72.02	71.5	0.52 <
AD	32 54 08	84 23 13	0.000 kW	0M	44.8	44.4	
Good Medicine Radio, Ga. Inc.							
WQIL.C	267C2	Chauncey	GA	111.1	60.09	54.5	5.59
CP CN	32 21 37	83 08 28	50.000 kW	150M	37.3	33.9	
Chauncey Broadcasting, Inc.					BPH891206MI		
WLRR	264A	Milledgeville	GA	38.1	78.67	71.5	7.17
LI CN	33 06 50	83 13 08	3.000 kW	100M	48.9	44.4	
Preston W. Small					BLH900913KB		
>*To channel 264C3 per D89-547							
WLYU	265A	Lyons	GA	111.2	135.31	114.5	20.81
LI CN	32 06 48	82 23 52	3.000 kW	100M	84.1	71.2	
Thompson Radiobroadcasting Co					BLH890124KB		
WCJM.C	265A	West Point	GA	285.9	138.34	114.5	23.84
CP ZCN	32 53 48	85 09 24	6.000 kW	54M	86.0	71.2	
Radio Valley, Inc.					BPH910801IE		
WCJM	265A	West Point	GA	285.8	138.49	114.5	23.99
LI CN	32 53 42	85 09 32	1.850 kW	72M	86.1	71.2	
Radio Valley, Inc.					BLH6035		

ALLOCATION STUDY

THE ONLY IMPEDIMENT TO WPGA 6 KW OPERATION  
IS THE 264C3 ALLOCATION AT MILLEDGEVILLE,  
GEORGIA.

EXHIBIT #1  
TECHNICAL EXHIBIT  
RADIO PERRY, INC.  
265A - 100.9 MHz  
PERRY, GEORGIA

MARCH 1993

**BROMO**  
**COMMUNICATIONS**  
St Simons Island, Georgia  
BROADCAST  
TECHNICAL CONSULTANTS  
Washington, D.C.

AFFIDAVIT AND QUALIFICATIONS OF CONSULTANT


State of Georgia     )  
St. Simons Island    )  
County of Glynn       )                   ss:

CLIFTON G. MOOR being duly sworn, deposes and says that he is an officer of Bromo Communications, Inc. Bromo has been engaged by Radio Perry, Inc., licensee of Radio Station WPGA-FM, to prepare the attached Technical Exhibit.

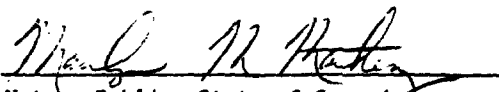
His qualifications are a matter of record before the Federal Communications Commission. He has been active in broadcast engineering since 1966.

The attached report was either prepared by him or under his direction and all material and exhibits attached hereto are believed to be true and correct.

*This the 25th day of March, 1993.*

  
\_\_\_\_\_  
CLIFTON G. MOOR  
Affiant

Sworn to and subscribed before  
me this the 25th day of March, 1993.

  
\_\_\_\_\_  
Notary Public, State of Georgia  
My Commission Expires: September 8, 1995

CERTIFICATE OF SERVICE

I, Beverles Jenkins, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on this 30th day of March, 1993, I caused copies of the foregoing "PETITION FOR RULE MAKING" to be sent via U.S. Mail, postage pre-paid to the person named below:

Timothy E. Welch, Esq.  
Law Offices of Dean, George, Hill  
and Welch  
1330 New Hampshire Avenue, N.W.  
Suite 113  
Washington, D.C. 20036

  
Beverles Jenkins

CERTIFICATE OF SERVICE

I, Tracy A. Holden, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on this 30th day of August, 1993, I caused copies of the foregoing "Petition for Reconsideration" to be delivered by first class mail, postage prepaid, to the person named below:

Timothy E. Welch, Esq.  
Law Offices of Dean George  
Hill and Welch  
1330 New Hampshire Avenue, N.W.  
Suite 113  
Washington, D.C. 20036

  
Tracy A. Holden